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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF COLORADO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The United States is conducting a cleanup of hazardous substances at the Rocky Mountain Arsenal pursuant to provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, which establish federal cleanup standards and provide a detailed process for incorporating both federal and state environmental standards into the CERCLA remedy. See Pet. 3-9, 12-13. The Tenth Circuit ruled in this case, however, that the State of Colorado may bypass that process by issuing compliance orders under state law. See Pet. 15-16; Pet. App. 1a-40a. As we explain in our petition, the court of appeals' decision warrants review because it presents an important issue concerning the relationship between federal and state authority, it conflicts with decisions of other

courts of appeals, and it incorrectly interprets the relevant provisions of CERCLA. Pet. 16-27. In response, Colorado has supplied an abundance of rhetoric criticizing the United States, but it has provided no persuasive legal argument counseling against review.

1. As our petition explains, CERCLA establishes a comprehensive process granting the States a major role in the CERCLA remedy selection process and directing how substantive state law shall be integrated into the CERCLA remedy. See Pet. 4-8, 22-25. Among other things, CERCLA provides that: (a) States must be afforded "substantial and meaningful" involvement in remedy selection; (b) the selected remedy must satisfy all "legally applicable or relevant and appropriate" requirements (ARARs) under federal law and more stringent state law, including state law authorized pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*; and (c) States may judicially challenge any decision by the United States to waive an ARAR and, if unsuccessful, may ensure that the requirement is met by providing the necessary additional funding. See Pet. 23; CERCLA § 121, 42 U.S.C. 9621. Furthermore, CERCLA grants States express authority to seek judicial enforcement of all ARARs, whether derived from federal or state law. See Pet. 7-8 n.3; CERCLA § 121(e)(2), 42 U.S.C. 9621(e)(2).[1]

This case places in question the significance of the CERCLA process that Congress has constructed to coordinate federal and state responsibilities at a CERCLA site. See Pet. 16-18. The United States submits that the CERCLA process provides the controlling basis for

[1] For those reasons, Colorado's claim that the CERCLA process relegates it to "begging and cajoling," leaving it "powerless" to protect its citizens (Br. in Opp. 15, 17 n.16), is inaccurate.

state participation once a federal facility is listed on the National Priorities List (NPL) and a federal response action is underway. Colorado contends that the process is simply an optional avenue for Colorado to enforce state standards at the site. That disagreement raises an issue of fundamental importance to the CERCLA program. Congress created a comprehensive scheme for the integration of substantive state law standards precisely because it was necessary to ensure that the United States and the individual States would coordinate their efforts through a single decisionmaking process that would produce a single coherent remedy. Pet. 17-18. Under Colorado's view, the ARARs process will come into play only when States "do not have their own hazardous waste programs or choose not to exercise their independent enforcement authority." See Br. in Opp. 20-21 n.18.[2]

Colorado devotes considerable energy to challenging our statement of the facts in this case, taking issue as to when the federal CERCLA cleanup actually commenced at the Rocky Mountain Arsenal, and attempting to minimize the dispute between the United States and the State as to the determination of cleanup requirements. Those arguments about factual details, however, have little to do with the legal question presented in our peti-

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[2] Significantly, 47 of the Nation's 56 States and Territories have RCRA-approved programs, and the remainder may have other applicable non-RCRA hazardous waste laws. Although Colorado generously states that the CERCLA process could be utilized at sites that are not subject to RCRA jurisdiction (Br. in Opp. 20 n.18), Colorado identifies no federal facility sites that it believes are subject to CERCLA jurisdiction only. Indeed, a facility that contains "hazardous substances" subject to CERCLA will also likely contain materials that fall within the broad definition of "hazardous waste" under RCRA. Compare CERCLA § 101(14), 42 U.S.C. 9601(14), with RCRA § 1004(5), 42 U.S.C. 6903(5).

tion. It is beyond dispute that the Arsenal's Basin F has been listed on the National Priorities List and that the United States is conducting an ongoing CERCLA cleanup at that location. The issue for this Court is whether, under those circumstances, Colorado may unilaterally impose state law requirements on the cleanup independently of the CERCLA process. See Pet. 18.[3]

Colorado also attempts to downplay the significance of the Final Amended Compliance Order (FACO), asserting that it "merely seeks to assert some authority" (Br. in Opp. 7-8) over the ongoing treatment and disposal of hazardous wastes. The FACO, however, requires the Army to submit for Colorado's approval a detailed Basin F closure plan and separate work and closure plans for each facility constructed for the federal CERCLA cleanup, which must provide for "final treatment/disposal of all Basin F liquid and solid hazardous wastes." Pet. App.

[3] Colorado's assertion that the United States has "misrepresent[ed]" the facts (*e.g.*, Br. in Opp. 10) as to the Arsenal cleanup history is surprising, given that our statement of facts is derived primarily from the court of appeals' opinion. Compare Pet. 10-15 with Pet. App. 8a-16a. For example, while Colorado casts doubt on whether the United States commenced a CERCLA remedial investigation and feasibility study in October 1984 (Br. in Opp. 6, 15), the court of appeals stated that "in October 1984, the Army commenced a CERCLA remedial investigation/feasibility study ('RI/FS')." Pet. App. 9a. Similarly, while Colorado asserts (Br. in Opp. 6-7) that the United States waited until October 1987 to inform the State that it intended to remedy Basin F under CERCLA, the court of appeals states that "[i]n June 1986, the Army announced that it was taking a CERCLA interim response action with respect to Basin F." Pet. App. 10a. The larger point, however, is that such details are irrelevant to whether, given that the United States *has* commenced a CERCLA cleanup at a federal facility listed on the NPL, Colorado may directly control federal response activities through state law compliance orders.

105a-108a. In turn, the FACO instructs that the "Army shall not implement any work plan, closure plan, or post-closure plan prior to approval by [Colorado]." *Id.* at 109a. Thus, the FACO effectively precludes the United States from implementing federal CERCLA response activities until Colorado approves them. See Pet. 14 & nn.6-7.[4]

2. As our petition explains (Pet. 18-20), the court of appeals' decision conflicts with other appellate decisions, most notably the Sixth Circuit's ruling in *United States* v. *Akzo Coatings of America, Inc.*, 949 F.2d 1409 (1991). Colorado's assertion that *Akzo* is irrelevant because it involved a consent decree that precluded the State of Michigan from imposing a state-law remedy (Br. in Opp. 25-26), overlooks the significance of that decision. While the federal CERCLA remedy in *Akzo* was indeed embodied in a judicially approved decree, the remedy was developed (and incorporated state law standards) pursuant to CERCLA Section 121(f)'s ARARs process. The court specifically described the ARARs process (949 F.2d at 1455-1456) and stated that under that process, "more stringent state environmental laws must be incorporated by EPA into federal consent decrees if relevant and applicable, but thereafter the state may not seek other

[4] Colorado accuses the United States of "disingenuously" claiming that the FACO requires the United States to obtain state permits. Br. in Opp. 7. The FACO asserts, however, that the Army violated Colorado laws requiring that facilities "must apply for a State-issued RCRA permit" (Pet. App. 71a), and the FACO directs the Army to submit a revised RCRA "permit application" for every facility constructed for the CERCLA cleanup (*id.* at 113a). Thus, the FACO is contrary to CERCLA Section 121(e)(1)'s express directive that "[n]o Federal, State, or local permit shall be required" for any response action conducted entirely onsite where selected in compliance with Section 121 cleanup requirements. 42 U.S.C. 9621(e)(1).

remedies that are at odds with the terms of the decree" (*id.* at 1457). The *Akzo* court rejected Michigan's attempt to impose a different state law remedy precisely because it was contrary to the federal remedy developed under CERCLA Section 121(f). See 949 F.2d at 1458; Pet. 18-20.[5]

3. Our petition also demonstrates (Pet. 20-27) that review is warranted because the court of appeals' construction of CERCLA is erroneous. The court misinterpreted CERCLA's jurisdictional limits on the timing of judicial review, CERCLA's provisions governing state participation, and CERCLA's directive that, once a CERCLA remedial investigation and feasibility study has been initiated, States may not unilaterally compel responsible parties to take remedial action. See Pet. 20-27. Colorado defends the court's decision primarily by reliance on two general savings clauses in CERCLA. Br. in Opp. 18-24. As we show in our petition, however, those provisions do not allow States to ignore other express CERCLA provisions and bypass CERCLA's comprehensive remedy selection process. Pet. 24-25.

Colorado also cites two other CERCLA provisions. First, the State relies on CERCLA Section 106(a), 42

[5] Colorado additionally asserts that the Court need not examine CERCLA's jurisdictional limitations on timing of judicial review, CERCLA § 113(h), 42 U.S.C. 9613(h), because Colorado will likely file future actions against the United States in state court in a manner that would preclude removal. Br. in Opp. 23, citing *International Primate Protection League* v. *Administrators of Tulane Educational Fund*, 111 S. Ct. 1700 (1991). But even if Colorado successfully employs that tactic, other States may not. In any event, the question of Section 113(h)'s scope remains important in litigation apart from state enforcement actions. *E.g.*, *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011 (3d Cir. 1991). See Pet. 18, 21.

U.S.C. 9606(a), which it characterizes as another general "savings" clause. Br. in Opp. 19. Section 106(a) states that when the President determines that a hazardous substance release poses an "imminent and substantial endangerment," he may secure such relief as may be necessary "[i]n addition to any other action taken by a State or local government." 42 U.S.C. 9606(a). That provision, however, merely recognizes that a State or local government may already have taken some action under state law *before* the President acts under Section 106(a). It does not address whether federal law, once invoked, controls.[6]

Colorado also mistakenly relies (Br. in Opp. 19-20) on Section 120(i), which states that "[n]othing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of [RCRA] (including corrective action requirements)." 42 U.S.C. 9620(i). Colorado is, of course, seeking to enforce "its state hazardous waste management laws in lieu of RCRA." Pet. App. 61a-62a. But in any event, Section 120(i) can have no effect on the remedy selection and ARARs provisions set out in Section 121. Section 120(i) states only that nothing "*in this section*" shall affect RCRA obligations. 42 U.S.C. 9620(i) (emphasis added). Section 120(i) speaks to Section 120 alone, which deals with matters related to federal facilities, and not to the entirety of CERCLA. As EPA's Listing Policy states, Section 120(i) "leaves in

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[6] Moreover, Section 106(a) contains no delegation of federal authority to the States. As the Tenth Circuit has stated, Section 106(a) "does not allow a state, with or without a cooperative agreement, to seek injunctive relief against responsible parties." *State of Colorado* v. *Idarado Mining Co.*, 916 F.2d 1486, 1489 (10th Cir. 1990), cert. denied, 499 U.S. 960 (1991).

place limitations contained in *other* sections of the statute, such as * * * the process for selecting and waiving ARARS * * * and the ban on remedial actions not approved by the President." 54 Fed. Reg. 10,526 (1989).[7]

4. Finally, Colorado is mistaken in suggesting that review is unwarranted because CERCLA is currently before Congress for reauthorization. See Br. in Opp. 27-28. Congress will likely consider CERCLA reauthorization in its next legislative session. See CERCLA § 111(p)(1), 42 U.S.C. 9611(p)(1) (Supp. III 1991) (funding for CERCLA authorized only through fiscal year 1994). But as the Court explained in *Braxton* v. *United States*, 111 S. Ct. 1854 (1991), the possibility that Congress may resolve a conflict among the courts of appeals on a question of statutory interpretation is not generally a basis for this Court to refrain from considering the question. On the contrary, the Court ordinarily regards the task of resolving those conflicts as "initially and primarily ours." *Id.* at 1857.[8]

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[7] Colorado's reading would, in fact, produce the irrational result of specifically exempting federal facilities—and no others—from CERCLA's mechanisms for accommodating federal and state law. See Pet. 22-25.

[8] Indeed, Colorado can only speculate whether Congress's reconsideration of CERCLA will resolve the specific problem at hand. Congress may elect to reauthorize CERCLA without any amendments whatsoever. That was the result the last time CERCLA funding was extended. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 104 Stat. 1388-319. If Congress enacts substantive amendments, they may not address the question presented by the petition.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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